SUPREME COURT, U. S.

AUG 7 1967

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 464

PAUL BIAZEVICH, DINKO BIAZEVICH, and JERRY KUSAR, d/b/a M. V. LIBERATOR; JOHN GARGAS, NICK GARGAS, JOHN I. (JACK) GARGAS and NICK ANDRICH, JR., d/b/a M. V. CITY OF LOS ANGELES; VINCENT BUDROVICH and WESTERN BOATBUILDING COMPANY, d/b/a M. V. DELORES M.; JOHN CVITANICH and TOM MASON, d/b/a M. V. SEA KING; STEVE GARGAS, ANITA GARGAS, FRANCIS TRUTTA, MATE TRUTTA and FRANK S. GARGAS, d/b/a M. V. COLUMBIA; NICK MARINCOVICH and SOUTH COAST FISHERIES, d/b/a M. V. NEW SEA ROVER; NORMAN MEZIN and WESTERN BOATBUILDING COMPANY, d/b/a M. V. WESTERN FISHER; ANDREW RAFKIN, JR., MATT DRAGICH, PETER DRAGICH and FRANK KOSTRENCICH, d/b/a M. V. SEA SCOUT; PETER SESTICH, DOMINIC PICINICH, NICK MOSICH, GLORIA WALL and MILES GRADES, d/b/a M. V. ARLENE S.; JOHN STANOVICH, NICKOLAS STANOVICH, CARL A. LARSEN and FRENCH SARDINE COMPANY, d/b/a M. V. GOLDEN WEST; JOHN MISETICH, DOMINICK MISETICH, JAKOV MISETICH, MARTIN TARABOCHIA, ANTON KARMEN MISETICH, CHARLES A. CUREVICH and MATHIE D. CUREVICH, d/b/a M. V. RONNIE M.; JOHN ZOROTOVICH, PHILIP MLADINEO, MARTIN MONAS, ANTON MISETICH, IVAN MISETICH, and DOMINICK MISETICH, d/b/a M. V. DEFENSE; JOHN K. VILICICH, ADMINISTRATOR OF THE ESTATE OF ANDREW VILICICH, DECEASED, d/b/a M. V. MARSHA ANN; AMERICAN TUNA COMMITTEE; and SEINE AND LINE FISHERMEN'S UNION OF LOS ANGELES HARBOR AREA, SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO,

Petitioners,

and

SEINE AND LINE FISHERMEN'S UNION OF SAN PEDRO, affiliated with SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioners,

and

SEINE AND LINE FISHERMEN'S UNION OF SAN PEDRO, affiliated with SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of

Appeals for the Ninth Circuit which, on January 6, 1967, rendered a decree enforcing an Order of the National Labor Relations Board of March 2, 1962. On January 30, 1967 Petitioners filed their motion for extension of time to file their petition for rehearing, and within the appropriate time, to wit, on or about February 21, 1967, Petitioners petitioned the Court for re-hearing. Said Petition was denied on May 9, 1967.

The Court created a novel three part test of first impression which aggrieved parties must meet in order to obtain relief from errors heretofore deemed prejudical on their face, and enforced the order of the Board. It did not discuss the multitude of substantive questions presented, except to rely upon the Trial Examiner's and the Board's findings.

OPINIONS BELOW

The opinion and order of the Court of Appeals for the Ninth Circuit, reported at 374 F.2d 974 (9th Cir. 1967), appear in Appendix "A".

The Board's decision and order in case No. 19,228 below (R. 711-787, 976-1002) relating to your petitioning boatowners are reported at 136 NLRB 13 appearing at Appendix B). The Board's decision and order in case No. 19,227 (R. 188-802, 1073-1109), relating to your petitioning Seine and Line Fishermen's Union of Los Angeles Harbor, Seafarers' International Union of North America, AFL-CIO (herein called Seine and Line) are reported at 136 NLRB 1 appearing at Appendix C.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Ninth Circuit enforcing the decree of the National Labor Relations Board was entered on January 6, 1967. The period within which to file this Petition was extended by the Petitioners filing of their Petition for re-hearing which was denied on May 9, 1967. The jurisdiction of this Court is envoked under 29 U.S.C. §1254 (1).

QUESTIONS PRESENTED

1. Whether, Petitioners have been denied due process of law by way of the application of an impossible test of prejudice which the Court of Appeals created in the instant case.

2. Whether, the order of the N.L.R.B. should be enforced even though the attorneys for the General Counsel applied the incorrect test in determining which pre-hearing statements of their witnesses were made available to Petitioners.

3. Whether, the order of the N.L.R.B. should be enforced even though the Trial Examiner erroneously refused to personally examine certain memoranda to determine whether they should be made available to Petitioners for purposes of cross-examination of the Board witnesses, and even though the Trial Examiner erroneously revoked subpoenas *duces tecum* and *ad testificandum* properly served upon Board employees, preventing Petitioners from full and complete cross-examination of the Board's witnesses.

4. Whether, the N.L.R.B.'s finding with respect to the purported violation of Section 8(a)(3) of the Act is directly contrary to this Court's holding in *American Ship Building Co. v. N.L.R.B.* 380 U. S. 360 (1965).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, appear at Appendix D.

STATEMENT

I.

A FACTUAL REVIEW OF THE PROCEDURAL IRREGULARITIES OF THE PROCEEDINGS BELOW.

A. The Charges Brought by the Complaining Union and the Complaints Against the Boatowner Petitioners.

On January 13, 1956, the ILWU Local 33 filed charges against the boatowner Petitioners (Respondents below) affiliated with the American Tuna Committee (ATC), which charges were amended in various instances on February 13, June 26 and October 25, 1956. [R. 6-141.] These charges alleged that striking members of Local 33 were discharged in violation of the National Labor Relations Act and sought to reinstate the strikers who at that time had been replaced by other non-striking fishermen, and attacked the validity of the existing AFL-CIO contract covering crews on the American Tuna Committee fishing vessels.

On November 20, 1956, a consolidated complaint issued under Sections 8(a)(1), (2) and (3) and 8(b)(1)(A) and (2) of the National Labor Relations Act against the boatowner Petitioners and the Seine and Line Union AFL-CIO, Petitioners. No complaint was issued under Section 8(a)(5), urging that petitioning boatowners were refusing to bargain in good faith. [NLRB Case No. 21-CA-2380 through 21-CA-2402 and 21-CB-772.]

Prior to the issuance of this complaint, on June 5, 1956, a representation petition was filed by Local 33, ILWU, involving the parties to this action. The Board in that case, *Matter of Krist Gradis,* 121 NLRB 601 (1958) (the record of which has been incorporated within the instant record [R. 1042-1229]), had before it much of the same documentary evidence as is involved in this case. On August 19, 1958, the Board ordered an election and held that the members of the ATC constituted a clearly appropriate multi-employer unit and that the Petitioners ATC boatowners' termination of their 1955 agreement with Local 33 was not "untimely". [121 NLRB 601, 607, n. 17; R. 1169, n. 16.] A representation election was held on October 20, 1958. Petitioner Seine and Line Union was victorious and was certified on October 28, 1958 as the proper collective bargaining representative in the American Tuna Committee unit. [R. 1229-1236.]

B. The Pertinent Facts Relating to the Proceedings in the Initial Hearing.

On August 5, 1957, almost two years after the events that served as the basis of the complaint herein, the hear-

ing below was opened. On September 3, 1957, the Trial Examiner, Wallace E. Royster, began taking the testimony of the first of approximately seventy witnesses of the General Counsel who rested his case in chief on November 19, 1957. [Tr. 2394.]

1. **The Attorney for the General Counsel Refused to Produce Witnesses' Pretrial Statements.**

On September 3, 1957, after demand by the respective counsel for ATC and Seine and Line, the attorney for the General Counsel refused to produce the signed pre-hearing statements and Board questionnaire [ATC Ex. 1] of witness Ferdinand Granich of the DEFENSE although the documents directly related to his direct examination. The sole basis for the refusal to produce was the Rules and Regulations of the Board. [Tr. 154.] No valid privilege whatsoever was asserted. [Tr. 147-154.] Despite this refusal, the Trial Examiner rejected the insistent arguments of counsel for Petitioners and refused to direct the attorney for the General Counsel to produce any pre-hearing statements or answers to questionnaires given by witness Granich to Board Agent, Karl W. Filter, the Field Examiner assigned to these cases. [Tr. 155-156, 191.]

On September 4, 1957, the attorney for the General Counsel, again without asserting any privilege, absolutely refused to state whether or not his files contained any pre-hearing affidavit, questionnaire or other written signed statement obtained by Karl W. Filter or any other Board Agent [Tr. 328-329], relating to the subject matters testified to by witness George J. Bush of the DEFENSE. [Tr. 728-729.] On September 5, 1957, the

attorney for the General Counsel similarly and without privilege refused to identify or produce any pre-hearing statement in his files on witness John Dragich of the SEA SCOUT and all other witnesses thereafter called by and on behalf of the General Counsel. [Tr. 381.]

2. **The Trial Examiner Refused to Require Counsel for the Charging Union to Produce Pretrial Statements in His Possession.**

Upon the examination of Ferdinand Granich, it developed that the witness had made a written statement which he signed and gave to Karl W. Filter. [Tr. 154.] When the General Counsel refused to produce the statement, counsel for Petitioner requested that Counsel for the charging union supply him with a copy. He responded that he would not do so unless ordered. The Trial Examiner denied Petitioner's Motion to Produce. [Tr. 155.]

3. **The General Counsel Refused to Consent to the Inspection of Certain Documents.**

On September 18, 1957, Counsel for Petitioners served upon the Trial Examiner, Counsel for the General Counsel, and Counsel for all other parties, the Request for the General Counsel's Consent to Inspect Certain Documents. [ATC Ex. 16-A, R. 396, Tr. 2415-2417.] Therein Counsel sought, pursuant to Section 102.87 of the Rules and Regulations of the National Labor Relations Board, to inspect certain documents named therein, including:

(a) All affidavits and other statements in writing made to any Board agent by any witness who had testified

on behalf of the General Counsel in these proceedings, provided that such documents contained statements of the witness relating to the facts, events and matters upon which said witness testified herein;

(b) All questionnaires in the form of ATC 1 filled out by the witnesses who have testified on behalf of the General Counsel in these proceedings;

(c) All memoranda in the General Counsel's files relating to reports from the said witnesses or conversations with said witnesses by Board agents relative to the facts, events and matters about which said witnesses testified herein;

(d) All affidavits and statements signed by persons who have appeared as witnesses for the General Counsel relating to the facts, events and matters upon which said witnesses have testified herein, which documents have been filed with the Regional Office of the Board in support of the charges upon which the within complaint was based;

(e) All letters or other documents from witnesses who have testified on behalf of the General Counsel herein, written to any Board agent, or bearing upon the facts, events and matters upon which the witnesses testified in each proceeding. [ATC Ex. 16-A, R. 402-403.]

On October 4, 1957, the General Counsel denied the request of Petitioner *without asserting any privilege whatsoever*. [ATC. Ex. 16-B; R. 406.]

4. The Agent-Employees of Petitioner Refused to Respond to Validly Issued Subpoenas.

On November 20, 1957, Petitioners served upon the Regional Director, Henry W. Becker, the attorney for the General Counsel, George O'Brien, and the Field Examiner, Karl W. Filter, duly issued *subpoenas duces tecum* which ordered the agents of the Board to appear and testify before the Trial Examiner on November 27, 1957 and produce pre-hearing affidavits, questionnaires, memoranda of Board agents, and letters of some 71 witnesses. [ATC EX. 20, 21, 22; R. 407-429.] Petitions to revoke the subpoenas [G. C. 72-A, B.C. "Motion to Quash" R. 430-432], were denied by the Trial Examiner on December 4, 1957. [Tr. 3316.]

On the continued return date, December 4, 1957, the Agents refused to comply with the subpoenas and refused to testify or produce the documents although they were actually in their possession either in the hearing room or in Mr. O'Brien's Office next door to the hearing room. At no time did any of the agent-employees assert any privilege whatsoever. [Tr. 3011-3012; Tr. 3136; Tr. 3318-3333.]

5. Petitioners Sought to Keep the Hearing Open to Afford an Opportunity to Enforce Subpoenas and to Examine the Propriety of the Proceedings.

The hearing of February 7, 1958, after adjournment from the hearing of January 27, 1958, was pursuant to a telegram of the Trial Examiner, which gave notice that the hearing was to be closed. [Tr. 4165.] Counsel for Petitioners represented that he was filing an application

in the District Court for the enforcement of the subpoenas, and requested that the hearing be held open pending that Court's decision. [Tr. 4158-4160.]

The Trial Examiner issued, at the request of Counsel for your petitioning union three *subpoenas duces tecum* and three *subpoenas ad testificandum* which were to be served upon Becker, O'Brien and Filter. He also issued three subpoenas to Counsel for the petitioning boatowners directed to the same three persons, each of which subpoenas were returnable at 4:00 P.M., Monday, February 17th. [Tr. 4194-4195.]

At the hearing on February 17, 1958, the Trial Examiner considered petitions to revoke the subpoenas filed by the General Counsel, which were not served upon the responding parties until the opening of the hearing. On March 4, 1958, the Trial Examiner revoked the subpoenas. [G.C. Ex. 4, R. 613-614.]

6. The Field Examiner, Karl W. Filter, Passed Away.

During the recess between February 27, 1958 and July 9, 1958, the Field Examiner, Karl W. Filter, passed away. [Tr. 4223.]

7. The Hearing Was Closed.

On July 9, 1958, the Trial Examiner closed the hearing [Tr. 4256-4257], over the objection to your Petitioners who urged that the hearing be held open or continued to allow the Court of Appeals for the Ninth Circuit to rule on an application for temporary restraining order and injunction which would have required the Trial Examiner to keep the hearing open until the appeal of

Biazevich v. Becker was concluded. Despite the importance of the enforcement of the subpoenas which was being sought by the Respondents, the hearing was closed. [Tr. 4256-4257.]

C. The Pertinent Facts Relating to the Proceedings in the Perfunctory Reopened Hearing.

1. The Hearing was Belatedly Reopened in an Ineffective Attempt to Cure the Admittedly Error-Ridden Original Hearing.

On September 8, 1958, the Trial Examiner reopened the record in response to *Ra-Rich Manufacturing Corporation*, 121 NLRB No. 90, decided on August 28, 1958, and he reversed "any ruling made at the hearing denying the request of any Respondent for production of pretrial statements." [T.E. Ex. 1; R. 632, 633.] On November 4, 1958, the Trial Examiner granted the formal motions of Petitioners to reopen the hearing. [Tr. 4294.] Included within that order was the direction that General Counsel produce *each and all* of his witnesses for further cross-examination at the reopened hearing. [R. 639, 644.]

2. The General Counsel Refused to Produce Statements of Witnesses, Unless They Were Signed by the Witness.

Despite the Trial Examiner's ruling, the attorney for the General Counsel refused or failed to produce any statements in the possession of the Board except those which were "signed statements" in the possession of the

Board. [Tr. 5122.] The Trial Examiner did not require the production of statements made by some 33 witnesses who testified which may have been otherwise producible under applicable federal law. [Tr. 5127, 5129, 4371-4373, 4640, 4674-4678, 4952-4958, 4461-4466, 4512, 4686, 4691, 4794-4795; 4577-4589, 4639-4640, 4787-4788, 4511-4512, 5107, 5049-5050, 4950-4951, 4826-4827, 4831, 4832, 5099, 5016, 5017.] Many statements in the possession of Counsel for the charging union were not produced upon proper demand. [Tr. 5128, 4433-4435, 5049, 5050, 5099, 5025, 5026.]

3. The Filter Memoranda Were Discovered by the Attorney for the General Counsel but Were Not Examined by the Trial Examiner nor Produced for Cross-examination.

On November 4, 1958, Mr. O'Brien advised the Trial Examiner that he had found three notebooks of the deceased Board Agent, Karl W. Filter. In one of those notebooks there were some undated notes which related to witnesses' pretrial statements made in conference with Filter. Despite being urged to examine the documents *in camera* to determine whether they were such as should be presented to the Respondents' Counsel, the Trial Examiner refused. [Tr. 4834-4835.]

The ruling applied to statements made by all other witnesses. [See e.g., Tr. 4822-4837, Tr. 5016, 5017, Jerry J. Marinkovich; Tr. 4890-4891, Ferdinand Granich; Tr. 4952-4960, G. C. Ex. 74-A, B, and C, Sreko Matura; Tr. 1771-1733, John Rukavina.]

4. The General Counsel Refused to Consent to Have Board Agents Testify or Produce Documents in their Possession.

On December 16, 1956, Counsel for Petitioners sought the consent of the General Counsel for the production of Board employees' memoranda, memo pads, appointment books and so forth, relative to the examination of witnesses before trial, and to the testimony of Kennedy and O'Brien. [ATC Ex. 36; R. 651.] On the same day duly issued *subpoenas duces tecum and ad testificandum* were served upon Kennedy and O'Brien. [ATC Ex. 37, 38; R. 664-673.]

On December 19, 1958, the General Counsel for the Petitioner denied consent to have Kennedy and O'Brien produce documents or testify in the matter, without asserting any proper basis whatsoever. [ATC Ex. 40, R. 663.]

5. The Outstanding Subpoenas Served Upon the Board Agents Were Revoked by the Trial Examiner.

On December 19, 1958, Messrs. O'Brien and Kennedy filed their petitions to revoke the previously issued *subpoenas duces tecum and ad testificandum*. [ATC Ex. 41-44; R. 676-683.] On December 22nd, the Trial Examiner revoked the *subpoenas duces tecum and ad testificandum* "for the reasons given in the Petition to Revoke." [Tr. 5045.] These Petitions assert:

> "1. Under Section 102.95 of the Rules and Regulations of the National Labor Relations Board, Petitioner, who is an employee of the Board, is forbidden to disclose, with certain exceptions, official

information without the prior written consent of the General Counsel.

"2. The subpoenaed documents are official Board papers, not within the exceptions and the General Counsel has withheld the consent requisite for their disclosure.

"3. The evidence sought is privileged against disclosure by this rule." [R. 676-677, 678-679, 680-681, 682-683.]

Thus, upon the sole basis of the Board rule, the subpoenas were revoked.

6. **The General Counsel Failed to Produce Fourteen Witnesses Who Had Appeared at the Original Hearing.**

Despite the order of the Trial Examiner that the General Counsel produce each and all of his witnesses for further cross-examination [R. 639, 644], he failed to do so. No subpoenas were sought by the General Counsel to secure the attendance of the witnesses. [Tr. 5124.]

7. **The Trial Examiner Issued Subpoenas to Require the Attendance of Ten Absent Witnesses.**

Thereafter, on January 5, 1959, upon written application by Petitioners for *subpoenas ad testificandum* requiring the attendance and testimony of ten witnesses for the General Counsel who had failed to appear for further cross-examination, at the hearing on the morning of January 12, 1959, the Trial Examiner issued the subpoenas. [Tr. 5191-5193.]

8. **The Reopened Hearing Was Closed Even Though It Rendered the Subpoenas Useless.**

Immediately after issuing the subpoenas, referred to in Section 8, the Trial Examiner granted the General Counsel's motion to close the hearing, saying:

> "Well, if I were to close the hearing it would be in anticipation there would be no subsequent reopening." [Tr. 5183.]
>
> * * *
>
> "To close the hearing now is to give you subpoenas without permitting them to be any use to you." [Tr. 5193.] [See Tr. 5174-5193.]

On this note, the Hearing was closed. [Tr. 5194.]

II

A FACTUAL REVIEW OF THE SUBSTANTIVE ISSUES.

A. The Background to this Dispute Between the Fishermen and the Boatowners.

The San Pedro Harbor is made up of a community of Yugoslav, Oriental and Italian fishermen. Traditionally, ILWU Local 33 has consisted of the Yugoslav fishermen, and the Seine and Line Union consisted of the mixed Italian-Oriental fishermen. [R. 721, 1166.] The employer boats that are involved here for years and years have been owned and worked by fishermen belonging to the Local 33 Union. [R. 1166, 2474-2475, 3880-3882, 1472-1473, 3138-3139, 3945-3946, 3052-3055, 2897-2898.]

The Petitioner boatowners are members of 13 partnerships each of which operated a fishing vessel out of San Pedro Harbor, California. In early 1955, the fishermen employed on all of these vessels belonged to Local 33 which had executed its standard collective bargaining agreement with the boatowners. [R. 719; G. C. Ex. 33-35, Tr. 1979, 2001, 2010.] Under this agreement the crew was to receive a minimum guarantee per ton even though the price paid for the fish by the canneries fell below the guarantee. [R. 710; G. C. Ex. 33-34, Tr. 1979, 2001, 2132-2143.] In 1954-1955 the price paid by canneries for tuna declined drastically due to an influx of Japanese tuna boats. [R. 719; Tr. 2017.]

B. The Union Waived the Minimum Price Provisions.

In 1954, the members of Local 33 waived the minimum guarantee provision of their contract and were paid on the basis of a percentage of the gross catch. In late 1954, the skippers and boatowners were told by Sokolich, the Local 33 secretary, "Well, we did it in '54, . . . we'll do it again." [Tr. 2502, see 3241-3243.] They were told in 1955 by Marinkovich, an official of Local 33, that if they signed the minimum guarantee provision in the new contract and there was a further price drop ". . . we are not going to stick you with it." [Tr. 3062.] In accordance with this understanding Local 33 waived the minimum guarantee at least twice in 1955. [Tr. 2010, 2096, 2130-2143, 2096.] Despite these statements, the understanding, and the waivers, the Union reversed itself and refused to abide by the previous understanding. [Tr. 3539-3542.] It advised the skippers that the members of Local 33 would not fish for less than the minimum guarantee con-

tained in their contract. [R. 721.] The skippers of these fishing boats, which then belonged to a Fishermen's Cooperative, told the fishermen that they couldn't pay the guaranteed minimum, since in fact the guaranteed minimum was "substantially in excess of (the price) at which the catch could be sold." [R. 719.] In July and August of 1955, Sokolich said there was no use trying to settle the matter by discussions. [Tr. 3539.] Since the boatowners, through the Cooperative, had negotiated a contract which would not terminate until December, 1955, and all or substantially all of its fishermen were Local 33 members, the boatowners had no choice but to tie up the boats until such time as either the price of tuna offered by the cannery exceeded the minimum guarantee which the fishermen were demanding, or until such time as the fishermen would agree to fish for less than the cannery price. [Tr. 2907-2910, 3575-3576, 3960, 3143-3144, 2510, 2413.] It goes without saying that it was economically impossible to promise the fishermen a minimum guarantee of $310.00 a ton, and only receive $270.00 a ton from the cannery. [G. C. 43; Tr. 3668-3669.]

C. The Refusal of the Crew to Work Caused the Boats to Be Tied Up.

Thereafter, the fishing boats that the members of Local 33 had been working on were tied up in San Pedro Harbor. In July or August, members of Local 33 resolved that they would not fish except at the higher price and *no further meetings of the Union would be held to reconsider the question.* [Tr. 3576.] Since the tuna prices did not rise and the Union did not change its position with respect to meeting to reconsider the question of whether

it would fish for less than the minimum price, the boats remained tied up through the end of 1955. As far as the boatowners knew, the Union had taken the position that it would not fish at anything less than the minimum guaranteed price in the contract. The Union held out no hope of further negotiations on the question. As far as the boatowners knew, the previously available alternative of having the Union change its mind with regard to fishing at the prevailing fish prices no longer existed. At this point, the parties had reached an impasse; Local 33 was adamant — it would not fish for less than a guaranteed minimum, which was below the prevailing market for tuna; the boatowners and skippers could not keep their boats tied up until the price of tuna climbed above the minimum guarantee insisted upon by Local 33, since fishing was their livelihood.

D. The Boatowners Had Only One Alternative as a Source of Crew Members.

It was a matter of common knowledge that if a fisherman in San Pedro didn't belong to Local 33, he belonged to the Seine and Line Union, since both Unions had contracts with virtually the same Union security provisions and all fishermen belonged to one Union or the other. [R. 721; Tr. 106, 2158-2159.] So in trying to convince his fishermen friends and crew members to come fishing in 1956, the skipper discussed with the fishermen the ways that they could go fishing. The only apparent available way was to hire fishermen who would fish without a minimum guarantee. It was a fact of life that the only source of fishermen other than Local 33 was Seine and Line, and those fishermen did not insist upon a

guaranteed minimum. Sometime in July and August, the boatowners talked with their crew members and said things like, "We want to go fishing. If Local 33 continues in its adamant position with respect to the minimum guarantee we will not be able to fish together because it is economically impossible for me to guarantee the minimum contract price." In no way was this meant as a threat or coercion, but a mere discussion between fishermen about the facts of life in San Pedro Harbor.

E. The Contracts with Local 33 were Timely Terminated.

Since it was impossible to fish under the current collective bargaining agreement with Local 33, Rafkin, the skipper of the SEA SCOUT, properly filed a termination notice with Local 33. [G. C. Ex. 51.] The Union responded with a notice to its members that it was receiving termination notices from various boatowners and posted a notice asking, without any basis whatsoever, whether the fishermen wanted to continue working with such skippers, since the fishermen "were going to be fired at the end of the year." These notices were posted in the union hall and on the dock in San Pedro. [G. C. Ex. 51; ATC Ex. 7; Tr. 2102-2103, 2010-2012.] Except as to Nick Gargas, none of the boatowners was alleged by the complaining witnesses to have threatened to discharge them. [ATC Ex. 7; Tr. 2102-2103.] Even that allegation was proven to be unfounded.

The rest of the boatowners involved here decided to pull out of the Cooperative and form their own bargaining agency. They contacted Mr. Carl Gould, who as-

sisted them in the formation of the American Tuna Committee and the Committee gave Gould the power to bargain for them as a multi-employer unit. [G. C. Ex. 48; G. C. Ex. 49.] Thereafter, the agreements with Local 33 were timely terminated on October 26, 1955. [R. 720; G. C. Ex. 48, *Krist Gradis,* 121 NLRB 601, 607, n. 17.] Upon receipt of this notice, Local 33 added the various names of the skippers of American Tuna Committee to the notice it had posted when Rafkin filed his termination. On all of these notices, the statement that the fishermen were going to be fired was repeated in bold caps. [ATC Ex. 7.]

F. Local 33 Refused to Bargain with ATC Boatowners.

Throughout this period, the Union refused to recognize ATC as the proper bargaining unit for the 14 boats. In fact, even as late as December 14, 1955, the Union sent a letter to attorney Gould that said that none of the boatowners which purported to belong to the American Tuna Committee had withdrawn from the Fishermen's Co-op and the original contract with those boatowners still existed and was automatically renewed since it was not properly terminated. [G. C. Ex. 52.] Thus, even at this date, the Union refused to bargain with ATC.

Between December 15 and 20, the Union sent letters to its members stating that the boats that belonged to the ATC wouldn't have contracts on them for the new year and that the Union must make plans for picketing and other action. [ATC Ex. 8; Tr. 1498-1501.] This notice was posted around the dock and all of the community knew that the notices had gone out to the Union members.

On or about December 22, 1955, John Marinkovich, an official of Local 33, came to the COLUMBIA carrying picket signs. [Tr. 795-796, 3177-3180.]

About this time, the skipper of the SEA KING wanted to have some of his fishermen start with him on the new season fishing. His crew told him that the Union wouldn't let anyone fish on ATC boats. [Tr. 3614-3618, 3620, 773, 1948-1952, 3620-3621.] The Union consistently maintained this position and, at a meeting on December 26, 1955, resolved that it not change its persistent position. [G. C. Ex. 49.] And again on December 27, 1955, the Union secretary reiterated that the Union "stay at its same position." [G. C. Ex. 60.] On that same day, the Union ordered its members to picket on that day.

G. The Boatowners Necessarily Notified Their Striking Crew Members to Remove Their Clothes From the Boats.

Thereafter, in light of the continued work stoppage from July-August and in light of the continuing adamant position of the Union as exemplified by the current picketing which was further evidence of the strike attitude of the Union, it was obvious that the skippers would not be able to rehire their former fishermen for the next season.

To avoid having to share the catch with a fisherman who wouldn't fish, but who might argue that he was rehired for the 1956 season because he left his clothes on the boat, and to make a place for someone who would fish, Attorney Gould advised that each member of the ATC send a letter to each crew member to the effect that

in light of the Union's present unalterable position with regard to not fishing at the prevailing prices, the shipowner did not know whether the crew members would be fishing with the boat in January. [R. 722.] To avoid any misunderstanding, on or about December 27, 1955, the owners wanted the crew members to take their personal belongings off the boat. [G. C. Ex. 5.] None of the boatowners treated the notices as discharges. [Tr. 1071, 1245, 1046, 2541, 1831, 1839, 1835, 2439, 2540, 2537-2538, 2645-2648, 2545, 1922, 4992, 4562, 4563, 3409-3410, 3260, 364-365, 474-475, 442-443, 3386-3387, 3385, 3289, 3726-3727, 3618-3620, 3636, 3710, 4317, 4318, 3971, 942, 960-961, 3989-3991, 4032-4033, 4035-4036, 3992-3994, 4047-4050.] Rather, they sent them on the advice of their attorney to avoid the possible effect of *Vitco v. Joncich,* 130 F. Supp. 945 (S. D. Cal. 1955), which could have been interpreted as authority for requiring the owners to pay for the crew members whether they were going to fish or not, if their clothes remained aboard from one season to another. [Tr. 2470, G. C. Ex. 33, 2538-2539, 2602-2606, 3257-3259, 3660, 3661, 2718-2719.]

H. The Boatowners Hired the Only Skilled Fishermen Available.

By this time the beginning of the fishing season was upon the boatowners. They had to move fast. They tried to find skilled fishermen who would fish on their boats. Of course, the members of Local 33 would not fish on their boats, because of the resolution which the Union had adopted on November 4, 1955, to the effect that anyone who fished on such a boat would be branded

as a fink [Tr. 2213-2216], which is understood to mean "strike breaker," a man working behind a picket line, or someone that was assisting to break a strike. [Tr. 2207.] Many of the members were afraid of retribution in the event they did fish on an ATC boat. [Tr. 3614-3621, 773, 1948-1952.] So the only other source for skilled labor was through the Seine and Line Union. [Tr. 106, 2158-2159.]

After hiring their crews, John Calise, secretary of the Seine and Line, claimed a majority on the ATC boats and demanded the boatowners bargain with his Union. [R. 724, Tr. 3965-3967, 4043-4044, 2606-2609.] After a card check revealed that a majority of the fishermen employed by the ATC bargaining unit did belong to Seine and Line, Gould told Calise that he would negotiate with him with respect to a contract for the forthcoming tuna season. [R. 727.] After negotiating, on January 3-4, the contract was signed by boatowners of ATC and by Calise for Seine and Line. [Tr. 3661-3664, G. C. Ex. 66, 2556, 2560-2694.]

III

PERTINENT FACTS RELATING TO THE PROCEEDINGS BEFORE THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

The Board sought a decree of enforcement of its order in the Court of Appeals.

On November 30, 1965 this matter was orally argued before the Circuit Court. On January 6, 1967, the Court rendered its decision, in essence enforcing the order pre-

viously issued by the NLRB. After appropriate extension of time to file Petition for Re Hearing, Petitioners submitted such Petition, which Petition was denied on May 9, 1967.

The Court of Appeals for the Ninth Circuit held that its scope of review was limited and the question before it was not whether the conclusions drawn by the Board were right, but whether they were reasonable, citing 4 Davis Administrative Law, § 29.06 at 143 (1958). It then found that all of the conclusions and findings of the Board were supported by substantial evidence considering the record as a whole, and although different inferences might have been drawn from the facts the Board's construction of the events was reasonable and proper.

The Court then examined the inherent procedural irregularities that were alleged by Petitioners and found that the Trial Examiner erred in revoking the *subpeona duces tecum and ad testificandum* served upon Board employees, when the Trial Examiner relied solely on Board Rule 102.118. The Court further found that the Trial Examiner erred in refusing to examine certain notes of a Board employee to determine whether they met the substantially verbatim test of *Williams v. U.S.*, 328 F.2d 178 (D.C. Cir. 1963) and the Court found specifically that the reliance of the Trial Examiner on the representations of the General Counsel and his refusal to examine the documents when urged to do so was in error. *United States v. Kieg*, 320 F.2d 634 (7th Cir. 1963).

However, despite the admitted errors, the Court of Appeals for the Ninth Circuit found that the errors were not sufficiently grave to deny enforcement, since your

Petitioners did not, according to the Court, make a sufficient showing of prejudice as a result of such errors.

The Court of Appeals for the Ninth Circut adopted a novel test of first impression regarding the burden an aggrieved party must meet to establish prejudice from procedural errors that heretofore were considered prejudicial on their face:

> "It would be necessary first, that the inspection of the Filter memoranda and the enforcement of the subpoenas would have actually unearthed hitherto undisclosed statements; second, that by means of cross-examination based on these statements the testimony of several witnesses would have been successfully impeached; and third, that the Board, in light of this impeached testimony, would have made different findings."

Thus, there is squarely presented the question of whether in proceedings before the National Labor Relations Board, and presumably any other administrative board, it is necessary for parties who have admittedly not been accorded proper procedural safeguards to meet the test outlined by the Court of Appeals for the Ninth Circuit before relief from those errors can be cured.

REASONS FOR GRANTING THE WRIT

1. This case creates a grave conflict of opinion in the Federal Courts of Appeals in that the Court of Appeals for the Ninth Circuit has created a test of prejudice which places it in conflict with the Court of Appeals for the Second Circuit which has held the refusal to order production of documents by the Trial Examiner, "constituted error that could not have failed to prejudice." *NLRB v.*

Adhesive Products Corp., 258 F.2d 403 (2d Cir. 1958). It is also in conflict with the Court of Appeals for the Fifth Circuit where no prejudice is required to be shown when a Board attorney's relevant testimony is improperly excluded. *N.L.R.B. v. Capitol Fish,* 294 F.2d 868 (5th Cir. 1961). Even in the Ninth Circuit, prior to this case, if the limitation of cross-examination was to the Respondents' "possible prejudice" the matter should be remanded for further hearing. *NLRB v. Blase,* 338 F.2d 327 (9th Cir. 1964).

2. The Court of Appeals for the Ninth Circuit ignored the uncontested fact that the attorney for the General Counsel admittedly limited his search to "signed statements" even though the Court specifically noted in another connection that, signed or not, if memoranda contained substantially verbatim accounts of pretrial statements they should have been produced, citing *Palermo v. United States,* 360 U.S. 343, 345-346 (1959); Jencks Act, 18 U.S.C. § 3500 (e).

3. The Court of Appeals below has created a test for establishing prejudice that is impossible to satisfy and, therefore, prevents your Petitioners, and all similarly situated, from obtaining relief from the wrongful and erroneous withholding of pretrial or prehearing statements of witnesses, all of which amounts to a substantial denial of due process of law.

4. The N.L.R.B. issued its order prior to this court's decision in *American Ship Building v. N.L.R.B.,* 380 U.S. 360 (1965) and therefore did not view the actions taken by petitioners, in light of the economic impasse, with the tenants of that decision before it.

DISCUSSION

1. A conflict in the Courts of Appeals Has Been Created by the Decision of the Court of Appeals for the Ninth Circuit.

There is sufficient reason to grant this petition because there is now a conflict in the Federal Courts of Appeals with regard to the appropriate test, regarding prejudical procedural error, federal courts shall apply when reviewing decisions of administrative agencies. *Linkletter v. Walker,* 381 U.S. 618 (1965); *DiBella v. United States,* 369 U.S. 121 (1962); *Lehigh Val Co-op Farmers Inc. v. United States,* 370 U.S. 76 (1962); *United States v. Nugent,* 346 U.S. 1 (1953).

Prior to the decision below the Federal Courts of Appeals were fairly uniform in result when a party had been erroneously deprived of the opportunity to examine pre-hearing statement of the government agencies' witnesses, or when government agents or employees refused to testify in the absence of a validly exercised privilege. In *N.L.R.B. v. Adhesive Products Corp.*, 258 F.2d 403 (2d Cir. 1958), which first applied the Jencks rule to administrative hearings, the N.L.R.B. argued that the Respondents there had not been prejudiced. The Court found that the curtailment of the right to examine pre-hearing statements "constituted error that could not have failed to prejudice . . ." the Respondents.

Similarly, in connection with the admittedly erroneous revocation of *subpoenas ad testificandum* served upon Board employees, the Court of Appeals for the Fifth Circuit refused to enforce a Board order when a Board investigator refused to testify, because,

> "Fundamental fairness requires that Capitol Fish be allowed to introduce testimony that may impeach the evidence offered against it." [*N.L.R.B. v. Capitol Fish Co.*, 294 F.2d 868, 875 (5th Cir. 1961).]

Additionally, the Court of Appeals for the Seventh Circuit has found it to be reversible error for a Court to refuse to examine pre-hearing statements in camera. *United States v. Keig*, 320 F.2d 634 (7th Cir. 1964). See also, *Palermo v. United States*, 360 U.S. 343 (1959); *Williams v. United States*, 328 F.2d 178 (D.C. Cir. 1963); *Butler v. United States*, 317 F.2d 171 (D.C. Cir. 1963); *Saunders v. United States*, 316 F.2d 346 (D.C. Cir. 1963); *United States v. Tomaiolo*, 280 F.2d 141 (2d Cir. 1960); *United States v. McKeaver*, 271 F.2d 669 (2d Cir. 1959); *Anderson v. United States*, 262 F.2d 764 (8th Cir. 1959); *United States v. Aviles*, 197 F. Supp. 536 (S.D.N.Y. 1961).

The Court below argued that your Petitioners should have caused the pre-hearing documents to be incorporated into the record on appeal, under seal, to allow it to determine whether they should have been produced. The Court below fails to mention that it had an opportunity to examine at least a portion of the statements during the oral argument on this matter, when the attorney for the Board offered them to the Court for examination. Chief Judge Barnes expressed shock and indignation and suggested that the Board was too late in making the statements available. Your Petitioners should not have been denied their remedy of remand or non-enforcement of the decree, simply because the notes were not submitted to the Court "under seal" when at least some of the notes

were made available to the Court and it refused to examine them.

In contrast to the other Circuits, the Court of Appeals for the Ninth Circuit found below that even though your Petitioners have been denied pre-hearing statements, have been deprived of the right to examine Board agents, and even though the Trial Examiner failed to perform its affirmative duty with regard to examining the pre-trial statements, that your Petitioners must meet the Court's newly created test of prejudice before relief can be granted. Thus, there is sufficient conflict in the Federal Courts of Appeals to cause this Court to grant the Writ prayed for.

2. **The Testimony of at least Ten Additional Witnesses Should have been Stricken, Since the Attorney for the General Counsel Applied the Wrong Test in Determining which Pre-Hearing Statements he would Produce.**

The court below found that the testimony of at least ten witnesses who appeared at the reopened hearing should not be stricken because the counsel for the General Counsel represented to the Trial Examiner that he could not find any more statements, although he made a "thorough search." The court took the position that where statements are lost or destroyed in good faith the testimony of the witness need not be stricken. The court below ignored the fact, however, that the counsel for the General Counsel was applying the incorrect test in determining which statements he was searching for, and which he was to make available.

At the reopened hearing the counsel for the General Counsel represented to the Trial Examiner that he could not find additional *signed* statements of witnesses. (Tr. 4713, 4788, 5098, 5122). As the court below held in connection with other statements in the possession of the Board, if the counsel for the General Counsel had in his possession statements that "contained substantially verbatim accounts of pretrial statements orally made to a government agent by government witnesses, they should have been produced." (374 F.2d at 981) Since the counsel for the General Counsel erroneously was searching for only "signed statements" or those statements which were "authorized and ratified" by the witness, it was error for the court below to not require that at least the testimony of the 10 additional witnesses in question be stricken, and that the Board make new findings absent the stricken testimony.

3. The Newly Adopted Three Part Test which Petitioners Must Meet to Show Prejudice is on its face so Burdensome as to Deprive Petitioners and those Similarly Situated of Fundamental Due Process.

While the court below found that the Trial Examiner had committed error, it held that in order to prove petitioners were prejudiced it would be necessary to show:

> (1) that the inspection of the withheld memoranda and the enforcement of subpoenas would have *actually unearthed hitherto undisclosed statements; and*
>
> (2) that by means of cross examination based on these statements the testimony of several witnesses *would have been successfully impeached; and*

(3) that the Board, in light of the impeached testimony *would have made different findings.*

Even though the court found that the Trial Examiner and Board committed two fundamental procedural errors: (1) failure to personally examine certain memoranda to determine whether they were producible under the appropriate test, and, (2) revoking subpoenas properly served upon Board employees in the absence of a recognized evidentuary objection, the court found that, under its new test, no prejudice resulted.

The improper revocation of subpoenas was, in *General Engineering Inc. v. NLRB,* 341 F.2d 367 (9th Cir. 1965), sufficient error to cause the court in that case to refuse to enforce the Board order and to order a remand for appropriate further hearing, and no specific showing of prejudice was required. The court below attempted to distinguish *General Engineering* from the instant case on the basis that in *General Engineering* there was an offer of proof made by the party seeking the enforcement of the subpoenas, and that because of alleged inconsistent explanations made by the government's attorneys, there was good reason to believe that some producible documents might have been withheld. It is submitted that this alleged destination is insufficient to cause the court below to reach a different conclusion with respect to the instant case. If the court were to have applied the newly adopted test regarding prejudice to the *General Engineering* matter, the result there would have been the same as the result below. In fact, it is impossible to comprehend how the test could be applied in any case to provide relief from such errors.

As a matter of practicality and logic no respondent could meet the burden created by the test. It might be possible to satisfy the first portion of the test, if all available statements were ultimately produced by the particular governmental agency. There would, it is submitted, never be a case where a respondent could prove that it would successfully impeach a witness by use of the statement. The skill of the cross examiner, the demeanor, memory and ability of the witness, the attitude and skill of the trier of fact all may or may not play a part in whether the use of the statement during cross examination would successfully impeach a given witness.

The third portion of this conjunctive test needs no discussion. It is simply impossible, as a logical matter, to forecast whether any agency would or would not make different findings.

Aside from the obvious practical and logical deficiencies in the test, it is void as a legal matter for depriving your petitioners of procedural due process. As recently as 1964 the same court of appeals examined the prejudice that can be suffered by a respondent by the failure of the Board to produce pretrial statements. In *Harvey Aluminum v. NLRB*, 335 F.2d 749 (9th Cir. 1964), the court refused to enforce an order of the Board, saying:

> "Prior statements of a witness relating to his testimony must be produced by the government because 'justice requires no less'. *Jencks v. United States, supra*, 353 U.S. at 669, 77 S. Ct. 1007, 1 L. Ed. U.S. 1103. The rule applies to proceedings of the Board because ' "the laws under which these agencies operate prescribe the fundamentals of fair play."

> Their proceedings must satisfy the pertinent demands of due process.' *Communist Party of the United States vs. Subversive Activities Control Board,* 102 U.S. App. D.C. 395, 254 F.2d 314, 327 (1958)." (335 F.2d 753.)

This court has said that the right to a fair and open hearing is one of the

> "'. . . rudiments of fair play' . . . assured to every litigant by the Fourteenth Amendment as a minimal requirement. . . . There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored." [*Ohio Bell Telephone Company v. Public Whites Commission,* 301 U.S. 292, 304 (1936)]

Other courts of appeal have found it to be a denial of due process to exclude relevant evidence, and the extent of prejudice has not been found relevant. *Donnelly Garment Co. v. NLRB,* 123 F.2d 215 (8th Cir. 1942); *NLRB v. Burns,* 207 F.2d 434 (8th Cir. 1953); *cf., Kelly v. Herak,* 252 F. Supp. 289 (D.C. Mont. 1966).

Aside from logic, as a matter of law the court should not speculate upon what the Board would have otherwise done. *NLRB v. Burns;* 207 F.2d 434 (8th Cir. 1953), and therefore the last part of the test is clearly erroneous. Therefore, the court should have, at the very least, remanded the matter in order to allow the trier of fact to listen to all of the evidence and to make whatever additional or different findings it might find appropriate. *Russell-Newman Mfg. Co., v. N.L.R.B.,* 370 F.2d 980 (5th Cir. 1966); *Wheeler v. NLRB,* 314 F.2d 260 (D.C. Cir. 1963).

4. The NLRB's Finding, Approved by the Court Below Without Discussion, That the Petitioner Boatowners Violated Section 8(a) (3) of the Act is Directly Contrary to this Court's Holding in American Ship Building Company v. NLRB.

There can be no question that your Petitionering boatowners and the members of Local 33 had reached an impasse due to the union's adamant position with regard to refusing to work at the about to terminate contract rate.[1] The record is overwhelming that Local 33 had taken an official position with regard to the wage rate and its philosophy of "no contract — no work." Under the circumstances that existed — with the recognized "facts of life" in the San Pedro Harbor — Petitioners had no real freedom of choice but to take what steps were necessary to get the boats to sea. As Board member Fanning, dissenting below, stated in summing up Petitioners' plight (quoting, in part, the Trial Examiner):

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[1]Neither the Board nor the Trial Examiner nor the Court below denied this fact. Indeed, the Trial Examiner in his Intermediate Report correctly found:

"The wording of the notice constitutes an accurate description of the situation as it existed in late December. In fact the Employer Respondents *did not know* if their old crews were to sail again with them. Evidence that some of these employers were willing and eager to re-ship their old crews abounds. So does evidence that the crew members would not then sail without the protection of a contract between the Employer Respondents and Local 33. As the crews were forming in early January, members of Local 33 would not go through the picket line then being maintained by their union." [R. 722.] [Emphasis in original.]

" 'They [Petitionering boatowners] could try to seek agreement with Local 33 and they had before October done so without success. They could offer the cannery price and take along any competent person who was willing to go. The second alternative was chimerical and probaly not even considered. *Local 33 members would not fish without a contract; nor would members of Seine and Line.' In these peculiar circumstances to hold, as the majority does, that the termination of Local 33 crew members was unlawful discrimination seems to me to go beyond the statutory proscription.*

"Section 8(a) (3) forbids an employer to discriminate against his employees to encourage or discourage union membership. The majority find that the boatowners discharged their employees 'to avoid dealing with Local 33.' Obviously, an employer, who is opposed to a union or unionism and discharges an employee to rid himself of an unwanted union has engaged in discrimination that discourages membership in that union. *But the facts in this case do not, in my opinion, neatly fit that niche.* [Emphasis in original.] Here the inference is at least equally valid that the Employers replaced their Local 33 crews because they found it impossible to meet the economic demands of the crews, voiced adamantly throughout Local 33. *Indeed, as I read the record, these boatowners would have preferred continuing to contract with Local 33 if they had thought it economically possible to do so.* Under all the circumstances, I question whether the General Counsel has proved by a preponderance of the

evidence that the termination of these employees is conduct of the type proscribed in Section 8(a) (3). Accordingly, I would dismiss this allegation of the complaint." [R. 996, 997.] [Emphasis added.]

The Board, in finding violations of Section 8(a) (3), held that the employees were not engaged in a strike at the time they were "discharged." Aside from the fact that the so-called "clothes letters" cannot properly be construed as discharge notices,[2] it is still nonetheless quite clear and undisputed that union officials had persistently and repeatedly refused to let Local 33 members work very long prior to the decision of the Petitioners to send the "clothes letters." A cessation of work is no less a strike because it is unaccompanied by picketing and other activity. *Massey Gin & Machine Works, Inc.*, 78 N.L.R.B. 189 (1948); *Electric Auto Lite Co.*, 80 N.L.R.B. 1601

[2]The record reveals that before the letters were sent to the crew that the attorneys that represented Local 33 brought an action in the Southern District Court of California, wherein the Court interpreted the Local 33 working agreement in light of maritime law and the hiring practices in the San Pedro fishing industry. *Vitco v. Joncich*, 130 F. Supp. 945 (S.D. Cal. 1955). The Court held that a fisherman was entitled to his share of the catch even though he did not fish for the entire season. Attorney Gould was fearful that Local 33 would urge that a man who was hired, expressly *or by implication*, at the beginning of the year, would be entitled to his full share of the catch even though he did not fish. Accordingly, Gould advised the skippers to send the letters. [Tr. 2538-2539, 2602-2606, 3257-3259, 3660, 3661.] There was absolutely no anti-union animus present. There was merely an innocent intent to avoid having to pay men who refused to fish. The overriding intent of the skippers, of course, was to make the berths available for whomever they hired for the new season. While Petitioners' primary intent was to avoid having to pay non-fishing fishermen, the effect of the notices was no greater than a notice that Petitioners intended to replace those men who refused to work.

(1948): Where a work stoppage is directed by the union leaders and by a formal vote, then the refusal to work is a strike. *Alabama Marble Co.*, 83 N.L.R.B. 1047 (1949).

Most importantly, however, the Trial Examiner and the Board, whose decisions predated the decision of this Court in *American Ship Building Co. v. N.L.R.B.*, 380 U.S. 300 (1965), unschooled with and unilluminated by, completely ignored the dictates and tenets of the *American Ship Building* case. This Court in that case held that an employer does not violate Section 8(a) (3) where, as here, the lockout of its employees was motivated by legitimate economic reasons or for avoiding serious economic consequences. As the concurring opinion of Justice White held, a bargaining lockout is determined by balancing conflicting legitimate interests. Here, there can be no question that based upon the "facts of life," the Petitioners had no alternative and certainly, as even the Trial Examiner recognized, there was absent any anti-union animus on the part of Petitioners. In the final analysis, the Petitioners found themselves between Chrydibis and Silla. Having chosen the only course that allowed the boats to sail may formerly have been thought by some to have been a technical violation of the Act. This Court's realistic holdings in American Ship Building have now properly laid to rest such a technical violation with such serious repercussions to employers and have adopted realistic indicia for ascertaining the propriety of employers' actions in these circumstances.

Since the decision of this Court in *American Ship Building* and after the Trial Examiner's and Board's decision in the instant case, the Board itself has recog-

nized and developed a liberal view of the right of employers to utilize a lockout or related tactics to avoid serious economic harm. That this penicillin was not afforded to Petitioners can only be ascribed to the fact that this Court's prescription was not enunicated until 1965.

The Board has recently held, relying upon *American Ship Building,* that an employer's lockout tactics were justified in light of the fact that the union over a long period of time had neither receded nor offered to compromise with respect to its original demands and that an impasse in bargaining was inevitable. *Union Carbide Corp.,* 165 NLRB No. 26 (June 15, 1967). Soon thereafter, the Board in *The Evening News Association,* 166 NLRB No. 6 and *Weyerhaeuser Company,* 166 NLRB No. 7 (July 4, 1967) held that the pre-*American Ship Building* distinction between "offensive" and "defensive" lockouts by an employer has now been "obliterated as a matter of law." In the Board's view, a tactical lockout is legal if there is (1) a significant economic justification, and (2) a lack of conduct significantly prejudicial to union or employee interest. In the instant case, the Court below, the Board and the Trial Examiner all recognized the significant economic justification for the Petitioners' actions. The Trial Examiner's decision and the record reveal, moreover, that the action of Petitioners was not for the purpose of discriminating against Local 33 or favoring the Seine and Line Union; rather, the record shows that Petitioners preferred to have dealt with both Local 33 and its member-employees. Local 33, however, gave Petitioners no choice.

As recently as July 27, 1967, a Trial Examiner for the NLRB in *United States Sugar Corp.* (12-CA-3578; TXD-418-67; BNA 146 DLR, July 27, 1967) was met with a similar set of circumstances as in the instant case. He found, as in the instant case, that an impasse between the parties had been reached and that, therefore, the employer there was privileged, without violating the Act, to lay off its employees at any time while the bargaining impasse was in effect. He similarly found that the employer's failure to recall the laid off employees was not violative of Sections 8(a)(1) and 8(a)(3) of the Act.

In light of *American Ship Building* and the Board's recent elaboration of that case, it can hardly be denied that Petitioners' conduct, which the Board found to be violative of Section 8(a)(3) in 1962, would not today be considered an unfair labor practice. The error of the Board, though not excusable, is understandable. The Court below, however, erroneously failed to give any consideration whatsoever to the implications of *American Ship Building*.

CONCLUSION

For the foregoing reasons, we respectfully request that a writ of certiorari to the United States Court of Appeals for the Ninth Circuit issue.

Respectfully submitted,

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